STATE OF IOWA
DEPARTMENT OF COMMERCE
BEFORE THE IOWA UTILITIES BOARD

IN RE:	:	
	:	**DOCKET NO. RMU-2018-0100**
	:	
ELECTRIC VEHICLE INFRASTRUCTURE	:	

JOINT COMMENTS OF MIDAMERICAN ENERGY COMPANY, THE IOWA ASSOCIATION OF MUNICIPAL UTILITIES, THE IOWA ASSOCIATION OF ELECTRIC COOPERATIVES AND INTERSTATE POWER AND LIGHT COMPANY

Pursuant to the Order Requesting Additional Stakeholder Comment on Potential Rule Changes, MidAmerican Energy Company ("MidAmerican"), the Iowa Association of Municipal Utilities ("IAMU"), the Iowa Association of Electric Cooperatives ("IAEC"), and Interstate Power and Light Company ("IPL") (collectively, "the Joint Commenters") hereby submit these reply comments regarding the Iowa Utilities Board's ("Board") alternative Rule 20.20, which is modeled on a recent decision of the Kentucky Public Service Commission.

I. INTRODUCTION

Throughout this proceeding, the Joint Commenters have emphasized the importance of policies designed to promote electric vehicle ("EV") infrastructure and that recognize utilities' key role in a carefully coordinated and successful long-term EV infrastructure implementation strategy. The Joint Commenters continue to support the goal of promoting the growth of the EV market by providing clear regulatory guidance on the parameters under which a person or entity providing EV charging service meets the definition of a "public utility" under Iowa Code § 476.1 and, therefore, becomes subject to the Board's regulation. Put simply, the Joint Commenters remain confident that a balanced approach that fosters the electric vehicle market, while protecting consumers through policies against the unnecessary duplication of electric service, is achievable.

On August 1, 2019, the Joint Commenters filed in support of the alternative rule, but suggested additional revisions to achieve a balanced approach that fosters the development of the EV market while protecting consumers through policies prohibiting unnecessary duplication of electric service. The revisions largely centered on introducing the concept of self-generation and clarifying that behind-the-meter generation could not be provided to the public for compensation. The Joint Commenters believe these revisions will ensure that customers (1) may generate electric energy for their own use, (2) may provide electric charging services to EV owners without being considered a public utility, and (3) may not generate energy in excess of their own needs in order to sell to the public in commercial transactions. Other stakeholders, however, did not believe similar issues needed clarification.

With respect to the proposed behind-the-meter language, the responsive comments were generally positive. Sierra Club, for example, urges the Board to adopt not only Kentucky's behind-the-meter language, but also the Kentucky Commission's rationale—that EV charging stations do not provide service to the public. The Environmental Law and Policy Center and the Iowa Environmental Council support the clarification that behind-the-meter generation is acceptable for EV stations and request adoption of the alternative rule without further delay. The Office of the Consumer Advocate ("OCA") took a different approach. It does not support the alternative rule; instead, the OCA requests the Board adopt the originally proposed Rule 20.20, which exempts EV charging service from the definition of public utility without regard for the source of electricity, because it could not fathom any circumstances under which an EV charging station could be considered a public utility.

Iowa employs a transparent and open administrative rulemaking process. In fact, one of the Iowa Administrative Procedure Act's stated goals is increased public participation in the

formulation of administrative rules, which is designed to assist agencies in eliciting information, facts, and probabilities necessary for fair and intelligent action.[1] Furthermore, Iowa Code § 17A.4(1)(b) requires the Board to "consider fully all written and oral submissions respecting the proposed rule." These directives are particularly important in this proceeding in light of the proposed EV rules representing a major shift in Iowa's policy regarding the sale of electricity. Unfortunately, the other stakeholders' comments addressing the alternative rule fail to provide the Board guidance as they lack rigor and do not consider Iowa's relevant laws and precedent. Instead, those stakeholders generally accept the alternative rule simply because it is aligned with their policy objectives.

A more critical examination, however, reveals the alternative Rule 20.20's deficiencies and demonstrates that a one-size-fits-all approach will not work to resolve Iowa's specific charging station issues. Particularly problematic for the Joint Commenters is the rule's broad exemption for behind-the-meter generation, which runs counter to Iowa's case-by-case approach to determining whether an entity is a public utility. As explained more fully below, this exemption forms the core of the Joint Commenters' concern that the proposed rule would be overturned on judicial review on several grounds, including being based on an erroneous interpretation of law, being arbitrary and capricious, and being illogical or wholly irrational.

As noted above, the Joint Commenters support policies to further EV proliferation and investment in charging infrastructure and, therefore, offer the comments below to assist the Board in adopting a rule that is consistent with Iowa law and that would withstand the various arguments that may be raised upon judicial review. Accordingly, the Joint Commenters request the Board

[1] *See* Iowa Code § 17A.1(3). *See also* Arthur Earl Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process*, 60 Iowa Law Review, 731, 846 (1975).

decline to adopt the alternative Rule 20.20 as proposed and instead accept the revisions presented in the Joint Commenters' August 1, 2019 comments.

II. COMMENTS

A. The Alternative Rule is Subject to Invalidation upon Judicial Review.

i. The alternative rule is based upon an erroneous interpretation of a provision of law.

The alternative rule is susceptible to judicial review pursuant to Iowa Code § 17A.19(10)(c) because the rule reflects an erroneous interpretation of the definition of public utility. The Iowa Code defines a public utility as an entity furnishing electricity or natural gas to the public for compensation. When determining whether an entity's sales are clothed with the public interest, Iowa courts employ a practical, multi-factored analysis, which considers, in part, the configuration and capacity of the subject generation. In *SZ Enterprises, LLC v. Iowa Utilities Board*, 850 N.W.2d 441 (Iowa 2014), the Iowa Supreme Court found that Eagle Point Solar ("Eagle Point") was not a public utility under Iowa law; however, facts critical to the court's analysis included the size and location of the generation. Due to space limitations, the solar generation system installed by Eagle Point could not generate enough electricity to power the City of Dubuque's ("City") building. Furthermore, Eagle Point installed the solar generation behind the City's meter, which meant the electricity generated would not pass through the electric utility's meter.[2] The court relied on these facts when considering no less than four of the *Serv-Yu* factors.

In considering the first factor (what the corporation actually does), the limited nature of the electricity sales certainly influenced the court's belief that "there [was] no reason to suspect any unusual potential for abuse . . . . [and] no reason to impose regulation on this type of *individualized*

[2] *See SZ Enterprises, LLC v. Iowa Utilities Board*, 850 N.W.2d 441, 445 (Iowa 2014).

and negotiated transaction."[3] The second factor considers whether there is a dedication to public use. The court found that Eagle Point's rooftop solar generation failed to offset the City's electric usage and was "no more dedicated to public use than the thermal windows or extra layers of insulation in the building itself."[4] The sixth and seventh factors evaluate the entity's ability to accept all requests for service and its ability to discriminate among members of the public. The court found these factors cut against Eagle Point being considered a public utility because "Eagle Point is not providing electricity to a grid that all may plug into to power their devices and associated ['apps'], or more prosaically, their ovens, refrigerators, and lights. Instead, Eagle Point is providing a customized service to an *individual* customer."[5]

The individualized nature of the transaction is a common theme across all the above-referenced factors. Eagle Point provided service to a single customer on a single site, and because its solar generation system could not offset all of the City's use, the electricity was both generated and consumed behind the meter, and therefore, not dependent upon common facilities serving the public. The behind-the-meter provision of the alternative Rule 20.20, however, contains no such individualized limitations. It simply exempts EV charging stations from being a public utility if it obtains service from a behind-the-meter source.

Comments from the Alliance for Transportation Electrification ("Alliance") illustrate why such a blanket exemption is faulty.[6] Alliance highlights several business models that extend beyond the limited solar generation at issue in *SZ Enterprises*. Of particular note, and certainly

[3] *Id.* at 466 (emphasis added).

[4] *Id.* at 467.

[5] *Id.* (emphasis added).

[6] *See In Re: Electric Vehicle Infrastructure Rules*, Comments of the Alliance for Transportation Electrification, Docket No. RMU-2018-0100, filed August 1, 2019.

requiring the Board's consideration, is the model under which an EV charging station itself or a third party owns the station's behind-the-meter generation, yet the generation is sized such that it provides service not only to the charging station, but for other purposes as well (*e.g.*, sales to the incumbent utility's electric grid). Under the alternative Rule 20.20, such an arrangement would never be a public utility; however, the Joint Commenters argue that position is inconsistent with Iowa case law, which requires a practical, case-by-case approach to determining whether an entity has sales sufficient to clothe it with the public interest, one of the requirements to be a public utility.

The Iowa Supreme Court announced an eight-factor test for determining whether an entity has sales sufficient to clothe it with the public interest in *Iowa State Commerce Commission v. Northern Natural Gas I*, 161 N.W.2d 111 (Iowa 1968). In *SZ Enterprises*, the Iowa Supreme Court found that the Board failed to apply the factors from *Northern Natural Gas I*, and instead applied a different bright-line test for defining a public utility—specifically, whether the entity sold electricity on a per-kilowatt-hour basis.[7] The court declined to adopt the Board's new bright-line test and reaffirmed its practical multi-factored approach, which has been described as "[the] type of flexible interpretation that is necessary to comport legislative purpose with the variable nature of modern technology."[8]

The court is likely to find that the alternative rule suffers from the same fatal flaw as it is based on a similar bright-line rule, which the court has explicitly rejected. Exempting an EV charging station from being a public utility based on having behind-the-meter generation is not the type of multi-factored, case-by-case analysis Iowa has adopted. Furthermore, the rapid pace of

[7] *SZ Enterprises*, 850 N.W.2d at 465.

[8] *Id.* at 455 (citing *State ex rel. Utilities Commission v. Simpson*, 295 S.E.2d 753, 757 (N.C. 1978)).

generation and storage technology development risks the rule becoming stale even before it is adopted. As noted by comments from Alliance, combining behind-the-meter generation with storage creates new opportunities for sales both onsite and through use of the electric utilities' distribution and transmission infrastructure.[9] These developments represent the variable nature of modern technology that *Northern Natural Gas I'*s multi-factored approach captures well. Because the alternative Rule 20.20's broad exemption is inconsistent with the fact-specific analysis required for a public utility determination, the alternative rule is inconsistent with *SZ Enterprises*, and therefore, the rule is subject to be invalidated upon judicial review.

ii. The alternative rule is arbitrary and capricious.

The alternative rule is also subject to be invalidated as arbitrary and capricious upon judicial review under Iowa Code § 17A.19(10)(n). Agency action is arbitrary and capricious when it is taken without regard for the law or facts of the case.[10] In addition to the flawed interpretation of law described above, the alternative rule overlooks the proceeding's administrative record, which includes facts establishing that certain behind-the-meter arrangements run afoul of the statutory definition of public utility and Iowa's exclusive service territory law for electric utilities.

These facts have been raised from the outset of this proceeding. In its initial comments, IPL noted there were several methods for vehicle charging stations to obtain electricity, including asset ownership, non-utility leasing arrangements, and non-utility power purchase agreements, and that such arrangements may result in a charging station meeting the definition of a public utility

[9] Comments of the Alliance for Transportation Electrification at 2.

[10] *Arora v. Iowa Board of Medical Examiners*, 564 N.W.2d 4, 7 (Iowa 1997).

and triggering application of Chapter 476.[11] IAMU and IAEC have continuously urged the Board to take a facts-and-circumstances approach to the public utility and service area determinations instead of employing status exemptions for charging stations.[12] In addition to written comments, the same issues were raised during the oral comment proceeding convened by the Board. Again IPL, requested clarity on how the Board's rule would treat EV charging service providers obtaining generation from a source other than the incumbent utility.[13] IAMU and IAEC lodged a similar request when explaining to the Board why its bright-line exemption was too broad.[14]

While there may be no requirement that an agency respond to each and every comment received during the rulemaking process, agencies should respond to significant comments relevant to the proceeding. The comments raised by the Joint Commenters are significant because they directly relate to the core purpose of this rulemaking—establishing regulatory certainty before significant EV infrastructure deployment. The Joint Commenters have raised at numerous points the logical and predictable factual scenarios that will violate Iowa law. Even the Board, in its own order, noted the wide variety of charging station business models with varying levels of utility involvement[15], yet the alternative rule continues to ignore the issue, thereby providing scant clarity to potential market participants. Because the alternative rule continues to include a behind-the-

[11] *See In Re: Electric Vehicle Infrastructure Rules*, Interstate Power and Light Company's Comments Regarding Potential Rules for Electric Vehicle Infrastructure, Docket No. RMU-2018-0100, filed September 17, 2018. *See also* Interstate Power and Light Comments, pgs. 5-6, filed May 28, 2019.

[12] *See In Re: Electric Vehicle Infrastructure Rules*, Joint Comments of the Iowa Association of Municipal Utilities and the Iowa Association of Electric Cooperatives, Docket No. RMU-2018-0100, filed March 8, 2019.

[13] Transcript of June 12, 2019 Oral Comment Proceeding ("Tr.") at 16:24 – 17:5.

[14] Tr. at 28:18 – 29:6.

[15] *See In Re: Electric Vehicle Infrastructure Rules*, Order Requesting Stakeholder Comment on Potential Rule Changes, Docket No. RMU-2018-0100, issued February 6, 2019.

meter generation exemption without regard for the facts in the administrative record and Iowa law, the rule is subject to invalidation upon judicial review as arbitrary and capricious.

Alternative Rule 20.20 is also arbitrary and capricious because it is inconsistent with the Board's precedent regarding exclusive service territories. In Docket No. DRU-98-1, North Star Steel Company, sought access to MidAmerican's transmission and distribution network for the purpose of retail wheeling. MidAmerican sought a declaratory judgment in which it asked whether the Board's assignment of an exclusive service area gave MidAmerican the exclusive right and responsibility to sell electricity to retail customers, or were the Company's rights limited only to the transmission and distribution of electricity. After reviewing the statutes, the Board found the Iowa Legislature eschewed retail competition in favor of Chapter 476's regulatory scheme and it found nothing within the service territory statutes or Chapter 476 that limited the application of the service territory laws to transmission and distribution. Accordingly, the Board held that in assigning a service area to MidAmerican, the Company received the "exclusive right and responsibility to sell electricity to retail customers within its assigned area of service." And "the sale . . . of electricity includes generation, transmission and distribution."[16]

This decision, and others like it,[17] is predicated on an interpretation of the Iowa Code. In order for the Board to find that an energy marketer or alternative supplier violates the service territory law, the Board must find that those entities are "electric utilities" as defined in Iowa Code § 476.22 of the service territory laws. This is consistent with the Board's position in *SZ Enterprises*, where it argued that use of the word "includes" implies that the term "electric utility" as used in 476.22 has a broader meaning, than the term "public utility" as used in 476.1. This

[16] *In Re: MidAmerican Energy Company*, Declaratory Ruling, Docket No. DRU-98-1, issued May 29, 1998.

[17] *See Lambda Energy Marketing, LLC v. IES Utilities, Inc.*, Final Decision, Docket No. FCU-96-8, issued August 25, 1997.

interpretation recognizes there may be entities whose activities may not rise to the level of being a public utility, but may nevertheless jeopardize the provision of economical and efficient electric service to the public. The Board should adopt that interpretation with the alternative rule too. To the extent an entity generates electricity and sells that energy directly to public, it has infringed upon the utility's exclusive service area.

iii. The alternative rule is the product of illogical and wholly irrational reasoning.

The alternative rule also appears to be the product of reasoning that is "illogical" and "wholly irrational" within the meaning of Iowa Code § 17A.19(10)(i). In its Order issued on February 6, 2019, the Board rejected the OCA's claim that the Board lacked statutory authority to regulate third-party operators of electric vehicle charging stations, finding that OCA's position "appears to be precisely the type of 'bright-line' rule the Supreme Court expressly disavowed in *SZ Enterprises*." This was the correct understanding of the court's holding in the case.

Furthermore, the Board's Order of February 6, 2019 also acknowledged that it has a *duty* to regulate all public utilities. Specifically, the Board said that "while appreciating the possibility that there could be situations in which an EV charging station does not constitute a 'public utility' under the eight-factor test, the Board is unwilling to disregard its statutory obligation to regulate public utilities under the conclusory assertion that all EV charging stations are not public utilities…"

However, despite rejecting the OCA's bright-line test and despite acknowledging a duty to regulate, the alternative sub rule 20.20(1) both creates a bright-line test and fails to regulate activity that clearly falls within the meaning of "public utility" under Iowa Code § 476.1 by exempting EV charging stations that obtain electricity from a behind-the-meter source. This is inconsistent with the requirements of Iowa code section 17A.19(10)(i).

III. CONCLUSION

The Joint Commenters appreciate the Board putting the alternative EV charging station rule out for comment as it represents a positive step towards a final rule that promotes EV infrastructure development within Iowa while respecting the policies underpinning exclusive service territories. However, contrary to other stakeholder comments, the alternative rule should not be adopted as proposed. These Joint Comments have established serious legal concerns regarding EV charging stations that obtain electricity from a behind-the-meter source that should be addressed before the Board adopts a final rule. Therefore, the Joint Commenters request the Board accept these comments and adopt the revisions included in their August 1, 2019 filing.

Respectfully submitted,

On behalf of
MIDAMERICAN ENERGY COMPANY

By: /s/ *Arick R. Sears*
Arick R. Sears
Senior Regulatory Attorney
666 Grand Ave., Suite 500
P.O. Box 657
Des Moines, IA 50306
(515) 281-2782
arsears@midamerican.com

On behalf of the
IOWA ASSOCIATION OF MUNICIPAL UTILITIES

By: /s/ *Timothy J. Whipple*
Timothy J. Whipple
General Counsel
1735 NE 70th Avenue
Ankeny, Iowa 50021
(515) 289-1999
twhipple@iamu.org

On behalf of the
IOWA ASSOCIATION OF ELECTRIC COOPERATIVES
SULLIVAN & WARD, P.C.

By: */s/ Dennis L. Puckett*
Dennis L. Puckett
6601 Westown Parkway, Suite 200
West Des Moines, Iowa 50266
(515) 244-3500
dpuckett@sullivan-ward.com

On behalf of
INTERSTATE POWER AND LIGHT COMPANY

By: */s/ Andrew D. Cardon*
Andrew D. Cardon
Attorney
200 First Street, S.E.
P.O. Box 351
Cedar Rapids, Iowa 52401
(319) 786-4236
andrewcardon@alliantenergy.com

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